Tang Kwor Ham @ Tang Kwor Harm & Ors v Lembaga Kumpulan Wang Simpanan Pekerja

HIGH COURT (MELAKA) — CIVIL APPEAL NO 1–12–73 OF 2004
LOW HOP BING J
28 FEBRUARY 2006

Civil Procedure — Pleadings — Issues not pleaded — Whether defendant at liberty to raise an issue which had not been pleaded in statement of defence

Labour Law — Provident Fund — Contributions — Computation of arrears — Whether plaintiff had wrongly computed arrears of contributions

Labour Law — Provident Fund — Contributions — Obligations by employer — Whether the defendants jointly and severally being the arrears of EPF contributions for the employees of the company — Employees Provident Fund Act 1991 ss 45(1), 45(3), 46(1) & (2)

The plaintiff is a statutory body established under s 3 of the Employees Provident Fund Act 1991 ('the Act') while the defendants were the directors of Tang Kwor Ham Realty Sdn Bhd (special administrators appointed) ('the company'), for the period from 6 November 1997 to 10 September 2002. The plaintiff claims a sum of RM21,328 against the defendants jointly and severally being the arrears of EPF contributions for the employees of the company for the period from October 1998 to September 2000, dividend at the rate of 6.7% pa for the year 1998, 6.84% pa (1999), 6% pa (2000) and 5% pa (2001); interest at 7.7% pa from 1 September 1998 to 20 March 2000, 7.84% pa from 21 March 2000 to 25 February 2001, 7% pa from 26 February 2001 to 21 March 2002 ('the entire period'), till the date of realisation and costs. This was an appeal by the second and third defendants ('DD2 and 3') against the decision of the learned sessions court judge ('the trial judge') who had on 7 June 2004 entered summary judgment with costs against DD2 and 3 as well as the first defendant under O 26A of the Subordinate Courts Rules 1980 ('SCA 1980').

Held, dismissing the appeal:

(1) Section 45(1) of the Act, where relevant, provides for the obligation of the employer such as the company to pay EPF contributions of both the employer and the employee. Section 45(3) of the Act makes it mandatory for the company as employer to pay dividend which would have accrued on such contributions. Section 46(1) of the Act attributes joint and several liability to

the directors of the company. Under s 46(2) of the Act, the word 'contribution' in s 46(1) shall be deemed to include any dividend and interest due on any contribution. As DD2 and 3 were the directors of the company from 6 November 1997 to 10 September 2002, which period included the period in relation to the unpaid contributions, dividend and interest thereon, and in the light of the clear and unambiguous provisions contained in the above statutory provisions, especially s 46(1) of the Act, DD2 and 3 are joint and several liability for EPF contributions of the employees of the company (see paras 11–14, 17).

(2) The plaintiff's authorised officer had duly certified and served on the company entries in the plaintiff's account in Form E reflecting the schedule of arrears for the entire period. Before the commencement of this action in the sessions court, there had been no dispute by the company as to the computation or the contents therein. The company had responded to the above certificates in Form E by paying part of the contributions, dividend and interest, leaving the balance which now constitutes the plaintiff's claim. This was the company's undoubted affirmation of the truth of the contents thereof. There can be no two views that the plaintiff's certificates in Form E stood firmly unrebutted (see paras 20–21).

(3) In the light of the principles enunciated by the Federal Court in *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC), as applied in two High Court judgments viz in *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] 1 MLJ 418 (HC), and *Vijayaletchimy v Annamalai Chettiar* [1990] 2 MLJ 492 (HC), the unpleaded issue that 'during the entire period, employees who were not the employees of the company were also included in the contributions payable by the company' cannot perform the function of fortifying the statement of defence and hence does not merit any consideration by the court. The answer to the question 'when a defendant resists an application by the plaintiff for summary judgment under O 26A of the SCA 1980, on the ground that there ought for some reason to be a trial of the plaintiffs claim under O 26A r 3(1) of the SCA 1980, is the defendant at liberty to raise an issue which has not been pleaded in the statement of defence?' must be answered in the negative (see para 34).

[Bahasa Malaysia summary

Plaintif merupakan satu badan statutori yang ditubuhkan di bawah s 3 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta tersebut') manakala defendan-defendan adalah pengarah-pengarah Tang Kwor Ham Realty Sdn Bhd (pentadbir-pentadbir khas yang dilantik), untuk tempoh dari 6 November 1997 hingga 10 September 2002. Plaintif menuntut sejumlah RM21,328 terhadap defendan-defendan secara bersama dan berasingan yang merupakan tunggakan sumbangan KWSP untuk pekerja-pekerja syarikat itu bagi tempoh dari bulan Oktober 1998 hingga September 2000, dibahagikan pada kadar 6.7% setahun untuk tahun 1998, 6.84% setahun (1999), 6% setahun (2000) dan 5% setahun (2001), faedah pada kadar 7.7% setahun dari 1 September 1998 hingga 20 Mac 2000, 7.84%

setahun dari 21 Mac 2000 hingga 25 Februari 2001, 7% setahun daru 26 Februari 2001 hingga 21 Mac 2002 ('keseluruhan tempoh'), hingga tarikh realisasi dan kos. Ini adalah rayuan oleh denfendan-defendan kedua dan ketiga ('DD2 dan 3') terhadap keputusan hakim mahkamah sesyen yang bijaksana ('hakim perbicaraan') yang telah pada7 Jun 2004 memasuki penghakiman terus dengan kos terhadap DD2 dan 3 dan juga defendan pertama di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR 1980').

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 45(1) Akta tersebut, di mana relevan, memperuntukkan tanggungjawab majikan seperti syarikat tersebut untuk membayar sumbangan KWSP untuk kedua-dua majikan dan pekerja. Seksyen 45(3) Akta tersebut mewajibkan syarikat tersebut sebagai majikan membayar dividen yang terakru ke atas sumbangan itu. Seksyen 46(1) Akta tersebut menganggap terdapat liabiliti bersama dan bersaingan terhadap pengarah-pengarah syarikat itu. Di bawah s 46(2) Akta tersebut, perkataan 'contribution' dalam s 46(1) hendaklah dianggap untuk merangkumi apa-apa dividen dan faedah yang perlu dibayar ke atas apa-apa sumbangan. Memandangkan DD2 dan 3 merupakan pengarah-pengarah syarikat itu dari 6 November 1997 dan 10 September 2002, yang merupakan satu tempoh termasuklah tempoh berkaitan sumbangan, dividen dan faedah yang tidak berbayar, dan berdasarkan peruntukan-peruntukan yang nyata dan jelas terkandung dalam peruntukan-peruntukan statutori tersebut, khususnya s 46(1) Akta tersebut, DD2 dan 3 bertanggungjawab bersama dan berasingan terhadap sumbangan KWSP pekerja-pekerja syarikat tersebut (lihat perenggan 11–14, 17).

(2) Pegawai yang diberi kuasa oleh plaintif telahpun mengesah dan menyampaikan ke atas syarikat itu kemasukan dalam akaun plaintif dalam Borang E yang menunjukkan jadual tunggakan bagi keseluruhan tempoh. Sebelum tindakan ini dimulakan di mahkamah sesyen, tiada pertikaian oleh syarikat tersebut berhubung pengiraan kandungan di dalamnya. Syarikat itu telah membalas terhadap sijil-sijil dalam Borang E dengan membayar sebahagian daripada sumbangan, dividen dan faedah tersebut, meninggalkan baki yang sekarang membentuk tuntutan plaintif. Ini adalah pengesahan syarikat yang tidak diragukan tentang kebenaran kandungannya. Tidak boleh ada dua pendapat bahawa sijil-sijil plaintif dalam Borang E kekal tidak dipatahkan (lihat perenggan 20–21).

(3) Berdasarkan prinsip-prinsip yang dinyatakan oleh Mahkamah Persekutuan dalam *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (MP), sebagaimana yang digunapakai dalam dua penghakiman Mahkamah Tinggi, *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] 1 MLJ 418 (MT), dan *Vijayaletchimy v Annamalai Chettiar* [1990] 2 MLJ 492 (MT), persoalan yang tidak diplidkan bahawa 'during the entire period, employees who were not the employees of the company were also included in the contributions payable by the company' tidak boleh menjalankan fungsi memperkukuhkan penyataan pembelaan dan justeru itu tidak memeritkan apa-apa pertimbangan oleh mahkamah. Jawapan

kepada persoalan when a defendant resists an application by the plaintiff for summary judgment under O 26A of the SCA 1980, on the ground that there ought for some reason to be a trial of the plaintiffs claim under O 26A r 3(1) of the SCA 1980, is the defendant at liberty to raise an issue which has not been pleaded in the statement of defence?' hendaklah dijawab secara negatif (lihat perenggan 34).]

Notes

For cases on contributions of Provident Fund, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1445–1449.

For cases on issues not pleaded, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 4854–4855.

Cases referred to

Gold Ores Reduction Co v Parr (1892) 2 QB 14 (refd)

Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, third party) [1989] 1 MLJ 321 (refd)

Ngai Heng Book Binder Pte Ltd v Syntax Computer Pte Ltd [1988] 2 MLJ 205 (refd)

Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran [1986] 1 MLJ 418 (folld)

United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (folld)

Vijayaletchimy v Annamalai Chettiar [1990] 2 MLJ 492 (folld)

Legislation referred to

Employees Provident Fund Act 1991 ss 3, 45(1), (3), 46(1), (2), 49(1), 64
Rules of the High Court 1980 O 14, O 18 r 19
Subordinate Courts Rules 1980 O 26A r 3(1)

Appeal from: Summons No 1–52–703 of 2003 (Sessions Court, Melaka)

AB Ng (AB Ng & Associates) for the defendant.
Azad Bashir (Bashir & A'sha) for the plaintiff.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the second and third defendants ('DD2 and 3') against the decision of the learned sessions court judge ('the trial judge') who had on 7 June 2004 entered summary judgment with costs against DD2 and 3 as well as the first defendant ('D1') under O 26A of the Subordinate Courts Rules 1980.

[2] A reference hereinafter to an order and a rule is a reference to that order and rule in the Subordinate Courts Rules 1980 unless otherwise stated.

[3] There is no indication as to who is acting for D1 who has been adjudged a bankrupt, and no sanction appears to have been given by the Insolvency Department.

FACTUAL BACKGROUND

[4] The plaintiff is a statutory body established under s 3 of the Employees Provident Fund Act 1991 ('the EPF Act 1991') while the defendants were the directors of Tang Kwor Ham Realty Sdn Bhd (special administrators appointed) ('the company'), for the period from 6 November 1997 to 10 September 2002.

[5] A reference to a section hereinafter is a reference to that section in the EPF Act 1991 unless otherwise stated.

[6] The plaintiff claims a sum of RM21,328 against the defendants jointly and severally being the arrears of EPF contributions for the employees of the company for the period from October 1998 to September 2000, dividend at the rate of 6.7% pa for the year 1998, 6.84% pa (1999), 6% pa (2000) and 5% pa (2001); interest at 7.7% pa from 1 September 1998 to 20 March 2000, 7.84% pa from 21 March 2000 to 25 February 2001, 7% pa. from 26 February 2001 to 21 March 2002, till the date of realisation and costs.

[7] The defendants' two-paragraph statement of defence averred first, that ss 45(1),(3), 46 and 49 do not provide for the defendants' joint and several liability for EPF contributions of the employees of the company; and secondly, that for the period from October 1998 to September 2000, EPF contributions for the employees of the company were not RM41,141, and so the arrears thereof were not RM21,328 or any other amount, in which case the above rates of dividend and interest could not be legally imposed.

[8] The plaintiff had vide certificates in Form E notified the company of EPF contributions for all the aforesaid periods, which amounted to RM41,141, out of which the company had effected payment of RM19,813 leaving an outstanding balance of RM21,328 together with the aforesaid rates of dividend and interest and this has been duly confirmed by the plaintiff's authorised officer at pp 17–28 of the appeal record.

DIRECTORS' JOINT AND SEVERAL LIABILITY

[9] Pursuant to para 1 of the statement of defence of DD2 and 3, Mr AB Ng learned counsel for DD2 and 3 submitted that as directors they are not liable jointly and severally to pay EPF contributions for the employees of the company for the period from October 1998 to September 2000 as special administrators had been appointed for the company on 30 June 2000, citing s 46(1).

[10] Plaintiffs learned counsel Mr Azad Bashir subscribed to the view that the defendants were jointly and severally liable for the plaintiffs claim, on the basis of ss 45(1), (3), 46 and 49.

[11] I shall now consider the sections relied on by the parties:

s 45(1) when relevant, provides for the obligation of the employer such as the company to pay EPF contributions of both the employer and the employee as follows:

45. Payment of contributions.

(1) Except where otherwise provided in this Act, the employer shall, in the first instance, be liable to pay both the contributions payable by himself and also, on behalf of and to the exclusion of the employee, the contributions payable by that employee; and for the purposes of this Act contributions paid by an employer on behalf of an employee shall be deemed to be contributions by the employee.

[12] In addition, s 45(3) makes it mandatory for the company as employer to pay dividend which would have accrued on such contributions, in the following words:

(3) Notwithstanding section 49, where an employer fails to pay any contributions due within such period as may be prescribed, the employer shall in addition to such contributions be liable to pay dividend which would have accrued on such contributions if such contributions had been paid by the employer within the prescribed period calculated in accordance with section 27:

Provided that where the rate of dividend for a particular year has not been declared by the Board, the rate of last dividend declared shall apply for the purpose of calculating dividend for that year.

[13] In the event of any contributions remaining unpaid by the company as employer, s 46(1) attributes joint and several liability to the directors of the company, as follows:

46. Joint and several liability of director, etc.

(1) Where any contributions remaining unpaid by a company,..., notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid,..., shall together with the company,..., be jointly and severally liable for the contributions due and payable to the Fund.

[14] Under s 46(2), the word 'contribution' in s 46(1) shall be deemed to include any dividend and interest due on any contribution.

[15] In addition to the aforesaid contributions and dividend, s 49(1) imposes an interest thereon at such rate as declared by the Board, in the following words:

49. Interest on contribution in arrears.

(1) Where the amount of the monthly contributions or part of any monthly contributions which an employer is liable to pay under section 45 is not paid within such period as may be prescribed, the employer shall be liable, in addition to the dividend to be paid under section 45(3), to pay interest to be credited to the Fund on such amount at such rate

(being a rate per annum) as declared by the Board from time to time in respect of each month or part of a month after expiration of such period during which such amount remains unpaid:

Provided that —

(a) if the amount of interest so calculated is less than ten ringgit, the interest payable shall be ten ringgit in respect of each such month or part of a month; and

(b) if the amount of interest exceeds ten ringgit, the interest payable shall be calculated to the next highest multiple of ten ringgit in respect of each such month or part of a month.

[16] Under s 49(2), the Board may exercise the discretion to remit in whole or in part the payment of any interest due under s 49(1).

[17] As DD2 and 3 were the directors of the company from 6 November 1997 to 10 September 2002, which period obviously included the period in relation to the unpaid contributions, dividend and interest thereon, and in the light of the clear and unambiguous provisions contained in the above statutory provisions, especially s 46(1), I am unable to find any substance in the above submission raised for DD2 and 3.

COMPUTATION OF ARREARS

[18] Apparently, on the basis of para 2 of the statement of defence, it was canvassed for DD2 and 3 that the plaintiff has wrongly computed the arrears of contributions thereby creating a triable issue, relying on *Ngai Heng Book Binder Pte Ltd v Syntax Computer Pte Ltd* [1988] 2 MLJ 205 HC Singapore.

[19] The plaintiffs response is that the plaintiffs authorised officer's certificates in Form E served on the company under s 64 are prima facie evidence of the computation.

[20] In my judgment, a proper perusal of pp 17–28 of the appeal record reveals that the plaintiffs authorised officer had duly certified and served on the company entries in the plaintiffs account in Form E reflecting the schedule of arrears for the entire period as alluded to above. Before the commencement of this action in the court below, there has been no dispute by the company as to the computation or the contents therein. Section 64 elevates the evidential weight of the certificates to the level of prima facie evidence and the truth of the contents thereof, as follows:

64. Certificate of authorized officer of the Board to be evidence.

In any legal proceedings a copy of an entry in the accounts of the Fund duly certified under the hand of an authorized officer of the Board shall be prima facie evidence of such entry having been made and of the truth of the contents thereof,

[21] It is significant to note that the company had responded to the above certificates in Form E by paying part of the contributions, dividend and interest,

leaving the balance which now constitutes the plaintiffs claim. This is the company's undoubted affirmation of the truth of the contents thereof. There can be no two views that the plaintiffs certificates in Form E stood firmly unrebutted.

Ngai Heng Book Binder, cited for DD2 and 3, concerns the plaintiffs claim for $8,050 due from the defendant in respect of printing charges and other materials supplied by the plaintiff to the defendant. The defendant contended that there was no prior agreement on the charges therefor, and requested the plaintiff to give a breakdown of the charges for colour separation and printing, but the plaintiff refused to accede to that request. On those relevant facts, Chao Hick Tin JC of the Singapore High Court (now JA) granted leave to defend.

[22] The facts in this appeal before me do not show any similarity with those in *Ngai Heng Book Binder*. On the contrary, I find that the plaintiffs certificates in Form E do contain detailed particulars of the employees' names, their EPF numbers, the period for which arrears of EPF contributions, dividend and interest were due and payable by the company. While there was a dispute as to the agreed charges and price for the goods and services rendered in *Ngai Heng Book Binder*, the company in the instant appeal, as alluded to above, had actually effected payment in response to the plaintiffs certificates in Form E, leaving the balance which is now the subject matter of the plaintiffs claim. In the circumstances, I hold that this issue raised for DD2 and 3 is not a triable issue.

UNPLEADED ISSUE

[23] By way of affidavit, DD2 and 3 averred, inter alia, that during the aforesaid period, employees who were not the employees of the company were also included in the contributions payable by the company. Although this averment has not been pleaded in the two-paragraph statement of defence, DD2 and 3 sought support in O 26A r 3(1) and contended that there ought for some reason to be a trial of the plaintiffs claim. For this purpose, *Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, third party)* [1989] 1 MLJ 321 was relied on.

[24] It was submitted for the plaintiff that the above unpleaded issue should not be considered by the court, on the strength of *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC); *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] 1 MLJ 418 (HC) and *Vijayaletchimy v Annamalai Chettiar* [1990] 2 MLJ 492 (HC).

[25] The above submissions concern an important question of procedural law which may be stated as follows:

[26] When a defendant resists an application by the plaintiff for summary judgment under O.26A, on the ground that there ought for some reason to be a trial of the plaintiffs claim under O 26A r 3(1), is the defendant at liberty to raise an issue which has not been pleaded in the statement of defence? ('the question').

[27] The answer to the question may be found by considering various authorities in which similar argument has been canvassed.

[28] In *Lin Securities (Pte)*, the plaintiffs and defendants were stockbrokers in Singapore and Kuala Lumpur respectively. Pursuant to a contract note, apparently issued in Singapore, the plaintiffs delivered to the defendants 800,000 shares in a company who s e share s were quoted on the Singapore Stock Exchange. The defendants accepted delivery of the shares and made two payments towards the purchase price, leaving a balance still to be paid, which was the plaintiffs' claim against the defendants. The plaintiffs filed an application for summary judgment, at the hearing of which the defendants apparently had taken up a point which had not been pleaded in the statement of defence, ie the law governing the contract in which the suit was based on Singapore law and so the matter was not suitable for disposal summarily. The learned registrar disagreed and gave summary judgment for the plaintiff. On appeal by the defendants, that unpleaded point was re-ventilated. VC George J (later JCA) at p 322I left column to A right column held that:

> No doubt a defendant is bound by the four corners of his pleading at the trial of the action but he is not so bound at the O 14 proceedings. Order 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

[29] The learned judge has in effect found that there were far too many questions to be dealt with in that matter and that one such question was whether Singapore law applied. In the circumstances, the learned judge allowed the appeal as there was sufficient cause to deny the plaintiffs summary judgment.

[30] On the other hand, in *United Malayan Banking Corporation*, the plaintiff claimed the outstanding sum on the loan granted to the first defendant, for which the second defendant had given a guarantee. The statement of claim did not disclose that the first defendant had lodged shares as security for credit facilities, and that the security had been realised in a series of sales of the shares. These matters were only disclosed for the first time in the affidavit in support of the O 14 application. In this regard, Raja Azlan Shah Ag LP (now HRH the Sultan of Perak) who delivered judgment for the Federal Court held that any defect or omission in the statement of claim cannot be made good by affidavit evidence, referring to *Gold Ores Reduction Co v Parr* (1892) 2 QB 14 where Mathew J said that 'it is most important that a defendant should know from the writ what the exact claim against him is'.

[31] The above judicial pronouncement of the Federal Court concerning a statement of claim was applied by Zakaria Yatim J (later FCJ) in *Pernas Sime Darby*, at p 419H left column, where the learned judge affirmed the decision of the learned registrar who had acted under O 18 r 19 of the Rules of the High Court 1980 and struck out the defendant's sham defence. The learned judge extended the ratio of the Federal Court to a statement of defence and hence declined to consider affidavit evidence which purported to improve the statement of defence.

[32] Most proximate to the question is the High Court judgment delivered by the same learned judge in *Vijayaletchimy* where there was an application by the plaintiff for final judgment against the defendant for possession of a piece of land together with a house erected thereon. The plaintiff claimed that she was the registered owner thereof while the defendant in the statement of defence averred that the property was held by another person on trust for and on his behalf, with no allegation of breach of trust nor particulars of breach thereof. The defendant's affidavit attempted to correct what he admitted was an error in his statemet of defence. The learned judge applied *United Malayan Banking Corporation Berhad* and *Pernas Sime Darby*, and reaffirmed the principle that any defect or omission in the statement of claim or statement of defence cannot be made good by way of affidavit evidence.

[33] In the light of the principles enunciated by the Federal Court in *United Malayan Banking Corporation Berhad* as applied in two High Court judgments viz in *Pernas Sime Darby* and *Vijayaletchimy*, I am of the view that the above unpleaded issue cannot perform the function of fortifying the statement of defence and hence does not merit any consideration by me. I therefore hold that the answer to the question is in the negative.

[34] Be that as it may, for the sake of completeness, I shall now proceed to analyse the issue in order to determine whether it attracts the application of O 26A r 3(1). The true position is unfolded in the company's payment of the arrears of EPF contributions, dividend and interest in response to the plaintiffs certificates in Form E containing, inter alia, particulars of the relevant employees of the company without any dispute whatsoever by the company. As alluded to above, this is the company's undoubted affirmation of the correctness and truth in relation to the employees of the company but which learned counsel for DD2 and 3 now contends otherwise. In my view, the facts and circumstances raised in the unpleaded issue do not even share a remote nexus with those in Lin Securities, supra. I therefore hold that the unpleaded issue does not constitute any triable issue, nor does it raise any reason to warrant a trial of the plaintiffs claim under O 26A r 3(1).

CONCLUSION

[35] The trial judge was correct in entering summary judgment for the plaintiff, which I hereby affirm with the result that this appeal is dismissed with costs.

Appeal dismissed.

Reported by Peter Ling